

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

In re:	)	MPC 15-0203	MPC 110-0803
	)	MPC 208-1003	MPC 163-0803
David S. Chase,	)	MPC 148-0803	MPD 126-0803
	)	MPC 106-0803	MPC 209-1003
Respondent.	)	MPC 140-0803	MPC 89-0703
	)	MPC 122-0803	MPC 90-0703
	)		MPC 87-0703

RESPONDENT'S MOTION TO RECONSIDER

The fairness of this entire proceeding depends on whether or not Dr. Chase is given equal access to the medical records and eye exams of the patients whom the State calls to testify in this matter. As a result, Respondent, David S. Chase, M.D., through counsel, hereby requests the Board to reconsider its August 17, 2004 Order denying his Motion for Access to Medical Records and Patient Exams. In support of his Motion, Dr. Chase submits the following Memorandum. Dr. Chase does not request a separate hearing on this Motion unless the Board deems such a hearing necessary.

MEMORANDUM

In his July 20, 2004 Motion for Access to Patient Medical Records and Patient Exams (the "Motion"), Dr. Chase requested that the Board exclude any evidence regarding patients who did not provide him the same access to medical records and to eye examinations that they had provided to the State. In his Motion and at oral argument, Dr. Chase made clear that he was not asking the Board to compel patients to release medical records or to undergo eye examinations. Rather, Dr. Chase requested the Board to protect the integrity of these proceedings by excluding evidence regarding those patients who have manifested prejudicial bias against Dr. Chase by refusing him an

equal opportunity to examine the same evidence that they have chosen to make available to the State.

The Board's August 17, 2004 Order appears to misapprehend the nature of Dr. Chase's request. The Order discusses at some length the reasons why the Board may not compel patients to release medical records or to submit to medical exams, (Order at 2-3), even though Dr. Chase explicitly made no such request. That same Order devotes exactly three sentences to the stated subject of Dr. Chase's Motion: his request to exclude evidence regarding those complaining witnesses who choose not to provide him with the same access to medical records and eye exams as they have provided the State. In this regard, the Order simply states that Dr. Chase's request to exclude evidence is supported by "neither the evidence nor the law," but does not discuss how either of these criteria bear upon the Board's decision. In fact, both the law and the evidence demonstrate that the Board has the power and the obligation to grant Dr. Chase the relief he seeks. Indeed, this Board cannot fulfill its function if it does not exercise its inherent authority to exclude unreliable and unfairly prejudicial evidence.

As an initial matter, the law makes clear that the Board has the power to exclude evidence at hearing in order to guarantee the fairness of this proceeding. The Vermont Administrative Procedures Act ("VAPA") explicitly states that the civil rules of evidence "shall be followed" in disciplinary proceedings such as these. 3 V.S.A. § 810(1). The VAPA also directs that "[a]gencies shall give effect to the rules of privilege recognized by law." *Id.* Thus, there can be no dispute that the Board has the authority to exclude evidence pursuant to these rules as the law and fundamental fairness require.

As discussed at length in Dr. Chase's Motion, the rules of evidence and recognized rules of privilege demand that if witnesses refuse to provide Dr. Chase with evidence of their medical conditions that have been put at issue, the Board can and must preclude the State from offering any

evidence of those medical conditions. (See Motion at 9-13.) As one Court put it, where a witness refuses to consent to the release of the relevant information, exclusion of the witness's testimony is "the only proper disposition." State v. Luna, 921 P.2d 950, 954 (N.M. 1996); see also State v. Skillicorn, 944 S.W.2d 877, 898 (Mo. 1997). The same considerations of equal access to evidence and fairness that were present in Luna and Skillicorn are present in this case as well.

The state of the evidence, too, demonstrates that if the State is to rely on the medical condition of its complaining witnesses, Dr. Chase must have the same access to medical records and eye exams as the State. Any other conclusion would fatally undermine the fairness of the merits hearing and practically pre-determine the outcome of this proceeding. The manifest unfairness that will result from the Board's Order takes several, concrete forms.

As an initial matter, the State accuses Dr. Chase of performing and recommending medically inappropriate cataract surgery. According to every doctor that has been deposed in this case to date, including the State's own expert, the question of whether or not cataract surgery is appropriate for any particular patient depends in large part on the patient's subjective visual complaints. (See, e.g., Transcript of August 6, 2004 Deposition of Dr. Patrick Morhun at 4:1-8, attached hereto as Ex. A.) Dr. Chase's medical records for all of the patient witnesses demonstrate that every such patient complained of or had cataract-related symptoms at the time Dr. Chase diagnosed them as having operable cataracts. At their depositions, many of the patient witnesses denied making such complaints and denied having any cataract-related symptoms. In order to investigate and defend against the patients' recent allegations, and to effectively cross examine the patients at hearing, Dr. Chase must be able to determine if they made similar complaints of visual symptoms to other medical caregivers—both eye doctors and general practitioners alike. Indeed, in order to evaluate the patient witnesses' hearing testimony, the Board, too, must have this information available to it. Unless Dr. Chase and the Board are provided access to the complaining patients' medical records,

they cannot begin to evaluate the truthfulness, weight, or importance of the patients' testimony, particularly where that testimony is contradicted by Dr. Chase's own medical records. As a result, if the patients refuse to provide Dr. Chase with the same access to medical records as they have given the State, that testimony should be excluded.

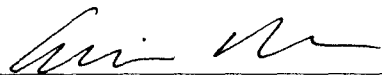
Second, the key to the State's case against Dr. Chase is the testimony of the doctors who have examined the complaining patients since they saw Dr. Chase. Based on their examinations, those doctors will testify that, with a single exception, all of the complaining witnesses have cataracts. Those doctors will also testify that they nonetheless would not have recommended cataract surgery for the patients because, in their opinions, the cataracts did not yet justify surgery. The question of when a particular cataract justifies surgical intervention is highly subjective and is one on which reasonable ophthalmologists can and often do differ. In justifying their opinions, the State's doctors will testify regarding the nature of the cataracts they saw during their examinations, most of which took place during the past year and in specific anticipation of this litigation. Dr. Chase, in turn, will be required to rely solely on his old, pre-existing medical records of the patient exams—many of which took place years ago among thousands of other exams performed during the normal course of his practice. Needless to say, Dr. Chase has very limited recollection of exactly what he observed as he looked into these particular patients' eyes years ago. He will be able to offer absolutely none of his own evidence regarding the current state of the patients' cataracts, as the State intends to do. He will therefore be unable to present any effective rebuttal to the State's doctors' testimony and will be extremely limited in his ability to cross examine them. In short, if the State is allowed to present testimony regarding the results of patients' recent eye exams, that testimony will necessarily go largely untested and unanswered. Neither Dr. Chase nor the Board will be in any position to evaluate or weigh the State's medical evidence. The Board will certainly be in no position to confidently decide whether Dr. Chase's decisions regarding cataract surgery

warrant the professional and reputational death sentence that the State seeks. For this reason, too, the Board should reconsider and reverse its Order denying Dr. Chase's Motion.

The Board's Order does not confront either of these difficult issues, other than to note, *ipse dixit*, that Dr. Chase will "have a full opportunity to cross-examine witnesses and introduce his own evidence at the disciplinary hearing." (Order at 3.) To the contrary, absent a Board Order granting Dr. Chase's Motion, he cannot have a full and meaningful right either to present evidence or to cross examine patients. Dr. Chase cannot present evidence to which he is not given access by the patient witnesses. Nor can he cross examine witnesses without the very information that might form the basis for the cross examination. Rather than protecting Dr. Chase's due process rights, the Board's Order has eviscerated them. In order to provide Dr. Chase with the fair and meaningful hearing to which he is entitled—rather than the lopsided affair the State has fought so hard to create—the Board should reconsider its Order and grant Dr. Chase' Motion.

Dated at Burlington, Vermont, this 23rd day of August, 2004.

SHEEHEY FURLONG & BEHM P.C.
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STATE OF VERMONT
MEDICAL PRACTICE BOARD

IN RE: DAVID S. CHASE

VOLUME II

DEPOSITION OF PATRICK J. MORHUN, M.D.,
taken on behalf of Dr. Chase at Lebanon, New Hampshire,
on August 6, 2004 before Cynthia Foster, RDR, CSR No.
16, a Certified Shorthand Reporter within and for the
State of New Hampshire.

APPEARANCES:

Joseph Winn, Assistant Attorney General
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109 State Street
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Burlington, Vermont, 05402, on behalf of Dr. David
S. Chase.

Cynthia Foster, RDR

Registered Diplomate Reporter

1 Q We were talking about the AAO standard for when
2 cataract surgery is appropriate?

3 A Yes.

4 Q Would you agree that the question of when cataract
5 surgery is appropriate for a particular patient
6 depends in large part on the subjective symptoms
7 experienced by the patient himself or herself?

8 A Yes.

9 Q I never asked you why you came to Lebanon to
10 practice. How did you find your way here?

11 A The hospital recruited me to come.

12 Q From Jules Stein?

13 A Yes. I had a headhunter looking for opportunities
14 for me.

15 Q What sort of opportunities did you have that
16 headhunter looking for?

17 A Practice opportunities across the country where I
18 could concentrate on cataract surgery.

19 Q Did you focus on rural as opposed to urban areas?

20 A I focused on areas where there was a need for the
21 services of a cataract surgeon.

22 Q What was the name of the headhunting firm that you
23 used?

**STATE OF VERMONT
CHITTENDEN COUNTY, SS.**

In re: David S. Chase MD)	Docket Nos. MPC 15-0203, MPC 110-0803,
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)	MPC 126-0803, MPC 106-0803, MPC 209-1003,
)	MPC 140-0803, MPC 89-0703, MPC 122-0803,
)	MPC 90-0703, MPC 87-0703

CERTIFICATE OF SERVICE

I, Eric S. Miller, counsel for Respondent David S. Chase, do hereby certify that on August 23, 2004, a copy of **Respondent's Motion to Reconsider** was served by United States First Class

Mail to:

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Dated: August 23, 2004.

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